UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NIAGARA BLOWER COMPANY,

*Petitioner,*

v.

Civil Action No.

SHOPMEN'S LOCAL UNION 576 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS,

*Respondent.*

**MEMORANDUM OF LAW IN SUPPORT OF NIAGARA BLOWER COMPANY'S VERIFIED PETITION TO VACATE ARBITRATOR'S AWARD**

BOND, SCHOENECK & KING, PLLC
Attorneys for Petitioner *Niagara Blower Co.*
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York  14202-2107
Phone: (716) 416-7000
Fax:  (716) 416-7348

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ........................................................ 1

ANALYSIS ........................................................ 6

1. The Arbitrator Exceeded His Authority Under the CBA and Effectively Eviscerated the Company's Well-Established Management Rights. ........................................................ 6

2. The Arbitrator Exceeded the Authority Granted to Him by the Terms of the Parties' Arbitral Submission. ........................................................ 11

3. The Arbitrator's Award Violates Explicit, Well-Defined, and Dominant Public Policy. ........................................................ 14

CONCLUSION & RELIEF REQUESTED ........................................................ 18

## PRELIMINARY STATEMENT

Petitioner Niagara Blower Company ("Petitioner" or "the Company") brings the accompanying Verified Petition to Vacate Arbitrator's Award ("Petition") under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the Federal Arbitration Act, 9 U.S.C. § 10. (Petition at ¶ 3). As set forth in the Statement of Facts contained in the Petition, this matter arises out of the Company's decision to discharge an employee at the Tonawanda manufacturing plant, John Beller ("Mr. Beller"), in March 2015. (Petition at ¶ 10). Mr. Beller began his employment with the Company in October 2011, performing safety-sensitive duties as a Welder. (*Id.*) The Company terminated Mr. Beller's employment on March 9, 2015, for working while being impaired by alcohol after a reasonable suspicion alcohol test performed during his work shift on March 6, 2015, showed the presence of alcohol in Mr. Beller's system. (*Id.*).

Shopmen's Local Union 576 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers ("the Union") filed a grievance challenging the termination. (Petition at ¶ 11). The Union's grievance was processed pursuant to the terms of the collective bargaining agreement ("CBA") between the Company and the Union (collectively "the Parties"), and was eventually submitted to Arbitrator Thomas N. Rinaldo, Esq., ("the Arbitrator") for arbitration. (*Id.*). The arbitration consisted of two days of hearing, held on September 15 and October 21, 2015. (Petition at ¶ 13). At the hearing, the Parties presented the following issues to the Arbitrator for resolution: "Was the discharge of [Mr. Beller] for proper cause? If not, what is the remedy?" (Petition at Exh. 5, p. 2).

On January 3, 2016, the Arbitrator issued his Opinion and Award ("Award"). (Petition at Exh. 5). The Arbitrator correctly noted in the Award that Section 6(B) of the CBA vests in the Company "'the right to establish, maintain and enforce reasonable rules and regulations to assure orderly plant operations' provided that such 'rules and regulations shall not be inconsistent or in conflict with the provisions of this [CBA].'" (Petition at Exh. 5, p. 17). The Arbitrator also correctly noted that the Company, in accordance with Section 6(B) of the CBA, established a category of work rule violations called "intolerable violations" and that an employee "committing such an offense is subject to immediate termination." (Petition at Exh. 5, p. 17) The "intolerable violations" set forth in the Company's Plant Rules include "[p]ossession, use or sale of any alcoholic beverage or illegal drugs on Company property **or working while impaired by alcohol or drugs**." (*Id.*) (emphasis added).

The Arbitrator expressly found that Mr. Beller was aware of the Company's Plant Rules, including its prohibition on working while impaired by alcohol of drugs. Specifically, the Arbitrator stated:

> There are no procedural obstacles to a just cause finding presented in this case. The notice or warning procedural requirement of just cause has been easily satisfied by the Company. Grievant's notice of the relevant work rules has been established. Moreover, any reasonable employee would know that it is contrary to the Company's expectations and rules to report

> to work while "impaired" by the use of alcohol. Also, any reasonable employee would know that a violation of this expectation or rule would subject the employee to the full range of available penalties.

(Petition at Exh. 5, p. 19, n.1).

Based on the evidence presented, which was established in large part through the expert testimony of Dr. Mark Costanza, a physician at Healthworks WNY who interpreted the blood alcohol test administered to Mr. Beller and testified concerning what the test result would have meant in terms of Mr. Beller's blood alcohol level and level of impairment when he reported to work, the Arbitrator concluded that "**the Company met its burden of proof of establishing misconduct in that Grievant reported to work on March 6, 2015, while he was impaired because of the ingestion of alcoholic beverages.**" (Petition at Exh. 5, p. 21) (emphasis added). Moreover, the Arbitrator expressly found that Mr. Beller's "short period of employment and less than stellar work record hardly constitute mitigating factors in the instant case." (*Id.*).

In sum, the Arbitrator expressly found that: (1) the Company specifically categorized "working while impaired by alcohol or drugs" as an "intolerable violation" subject to "immediate termination;" (2) the Company established that Mr. Beller was aware of this prohibition and the consequences of a violation; and (3) Mr. Beller committed "misconduct" in violation of the Company's established work rules by reporting to work on March 6, 2015, "while he was impaired." (Petition at Exh. 5, pp. 17, 19, 21).

Despite these express findings, however, the Arbitrator concluded that the Company was not justified in terminating Mr. Beller's employment. (Petition at Exh. 5, p. 21). Relying upon what he characterized as "traditional just cause standards," the Arbitrator found that the discipline imposed must, in his view, be "proportionate to the nature of the offense." (Petition at Exh. 5, p. 18). Upon this reasoning, the Arbitrator concluded that:

> In the absence of evidence that Grievant's behavior or work was, in fact, compromised, one is left with the potential for adverse consequences to have occurred. Under these circumstances, while Grievant's misconduct could be thought of as substantial to some extent, it cannot fairly be labeled as misconduct that requires termination. . . . The Arbitrator thus will modify the penalty of termination to a period of a fifteen-work day unpaid suspension. Grievant should be placed on notice by this Award that any future violation of the Substance Abuse Policy would clearly justify his termination. Grievant should therefore be returned to the workforce after completing any reasonable Company requirements for return to work. Additionally, he should be made whole for any lost wages or benefits occasioned by the Company's discharge decision.

(Petition at Exh. 5, pp. 21-22). In short, the Arbitrator found that Mr. Beller committed the violation with which he had been charged – he reported to work at his safety sensitive position while impaired by alcohol – but determined that the discipline specifically prescribed by the Company's Plant Rules (termination) was not appropriate because, according to "traditional just cause standards," the penalty was not proportionate to the nature of the offense. According to the Arbitrator, in order to justify termination, the Company was required to prove that Mr. Beller was not only impaired, but also that his impairment actually manifested itself in either his behavior or his work.

There are three problems with the Arbitrator's Award. Initially, by substituting his preferred manner of discipline for that specifically prescribed by the Company's Plant Rules, the Arbitrator exceeded his authority under the CBA by disregarding, and effectively eviscerating, the management rights specifically vested in the Company under Section 6(B) of the CBA. In addition, the Arbitrator exceeded the authority granted to him by the terms of the parties' arbitral submission. *See e.g., 187 Concourse Associates v. SEIU Local 32BJ*, 399 F.3d 524 (2nd Cir. 2004) (affirming district court's vacatur of arbitration award). Finally, by imposing upon the Company the requirement of proving not only an employee's impairment but also that it was actually manifested in the employee's behavior or work, the Arbitrator's Award basically invalidated the Company's Plant Rule and violated explicit, well-defined, and dominant public policy by effectively prohibiting the Company from terminating an employee, including Mr. Beller, for working while impaired by alcohol or drugs "in the absence of evidence that [the employee's] behavior or work was, in fact, compromised." (Petition at Exh. 5, p. 21). For all of these reasons, which are set forth in greater detail below, the portion of the Arbitrator's Award modifying the penalty imposed upon Mr. Beller by the Company must be vacated, or, in the alternative, the Award should be vacated in its entirety.

## ANALYSIS

1. **The Arbitrator Exceeded His Authority Under the CBA and Effectively Eviscerated the Company's Well-Established Management Rights.**

As the United States Supreme Court stated in the seminal Steelworker's trilogy cases:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). "The principal question for the reviewing court is whether the arbitrator's award draws its essence from the collective bargaining agreement, since the arbitrator is not free merely to dispense his own brand of industrial justice." *Saint Mary Home, Inc. v. Serv. Employees Int'l Union*, Dist. 1199, 116 F.3d 41, 44 (2nd Cir. 1997) (internal quotation marks and alteration omitted); *accord United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In this respect, it is well-settled that "the scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement." *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2nd Cir. N.Y. 2005) (quoting *Local 1199, Hosp. & Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22 (2nd Cir. 1992) (internal quotation marks omitted).

Here, the Arbitrator clearly exceeded the scope of his authority under the CBA. Specifically, Section 20(B) of the CBA provides that the arbitrator "shall not have the right to add to, subtract from, modify or disregard any of the terms or provisions of this agreement." (Petition at Exh. 1, p. 20-a). By its very terms, Section 6(B) of the CBA extends to the Company the express right to "**establish, maintain and enforce reasonable rules and regulations to assure orderly plant operations**" provided that such "rules and regulations shall not be inconsistent or in conflict with the provisions of this [CBA]." (Petition at Exh. 1, p. 6) (emphasis added).

The import of Section 6(B) cannot be overstated. This provision, which was the direct result of negotiations between the Parties and expressly executed by them, gives the Company the exclusive right to establish, maintain, and enforce reasonable rules and regulations to assure orderly plant operations. The Company's authority to do so is limited **only** to the extent its rules are inconsistent or in conflict with the provisions of the CBA. Section 6(B) is the very foundation upon which the Company established and maintained its Plant Rules specifically prohibiting its employees from "working while impaired by alcohol or drugs," and prescribing the "immediate termination" of any employee committing such an offense. (Petition at Exh. 2, pp. 1-2).

For his part, the Arbitrator noted the existence of these management rights. (Petition at Exh. 5, p. 17). He further found that, in accordance with these rights, the Company established Plant Rules that categorized "working while impaired by alcohol or drugs" as an "intolerable violation" and specified that employees committing such an offense are subject to "immediate termination." (*Id.*). He specifically found that the Company "easily satisfied" the burden of proving that Mr. Beller was aware of this prohibition and the consequences of a violation. (Petition at Exh. 5, p. 19, n. 1). And, the Arbitrator concluded, without reservation, that the Company met its burden of proof of establishing that Mr. Beller "reported to work on March 6, 2015, while he was impaired because of the ingestion of alcoholic beverages." (Petition at Exh. 5, p. 21).

The sum of these findings is simple: Mr. Beller committed an intolerable violation of the Company's published Plant Rules. By its express terms, Section 6(B) of the CBA authorizes the Company to enforce those Plant Rules, and it did so by imposing the very form of discipline prescribed by them – the termination of Mr. Beller's employment. By the express language of Section 6(B), the Company's authority to terminate Mr. Beller for this intolerable violation is limited only to the extent that the Plant Rule – which specifically prohibits employees from "working while impaired by alcohol or drugs," and prescribes the "immediate termination" of any employee committing such an offense – is "inconsistent or in conflict with" the CBA. (Petition at Exh. 1, p. 6; Exh. 2, pp. 1-2). The Arbitrator made no such finding.

Absent such a finding, the Arbitrator had no authority but to enforce the Company's decision to terminate Mr. Beller. Thus, the Arbitrator's Award – which converted Mr. Beller's termination to a 15 work day suspension without pay -- results in the complete disregard of the express management rights vested in the Company under Section 6(B), and effectively eviscerates that portion of the CBA.

Evaluating the Arbitrator's analysis with eyes open to the significance of Section 6(B), it is abundantly clear that he exercised what can only be described as *carte blanche* discretion to impose his own brand of industrial justice in fashioning what he deemed to be the appropriate penalty for Mr. Beller. Significantly, the Arbitrator inaccurately noted that the "proper cause" provision contained in Section 17(A)(3)[1] of the CBA "is the only negotiated disciplinary standard between the parties." (Petition at Exh. 5, p. 18).[2] The Arbitrator's finding in this respect completely ignored the negotiated disciplinary standards set forth in Section 6(B), where the Parties agreed that the Company had the right to establish and maintain reasonable rules and to prescribe discipline to enforce those rules. As such, rather than following the discipline standard set forth in Section 6(B) and implemented in the Plant Rules, the Arbitrator resorted to what he termed "traditional just cause standards" to impose a requirement that the discipline administered be "proportionate to the nature of the offense." (Petition at Exh. 5, p. 18). The Arbitrator also injected into his analysis an additional burden requiring that the Company present proof that Mr. Beller's "behavior or work was, in fact, compromised" in order to justify termination. (Petition at Exh. 5, pp. 18, 21). Neither of these requirements, however, is based in any way on the provisions of the CBA. To the contrary, they can only be justified by ignoring the express contractual language.

---

[1] Section 17 of the CBA is not a disciplinary provision at all, nor does it represent the embodiment of the Parties' intent with respect to "proper cause." Rather, Section 17 provides the framework for the parties' system of seniority, and subsection (A)(3) of that provision makes clear that an employee's seniority status will be terminated upon the "discharge of an employee for proper cause." The actual provision addressing the Parties' negotiated understanding of "proper cause" is contained in Section 6(A). Whether by an exercise of semantical acrobatics, or by mere oversight, the Arbitrator's error is significant since, by any reading, the provisions of Section 6(B), which establish the specific disciplinary standards negotiated by the Parties, unquestionably lends clear context to the concept of "proper cause" set forth in the same Section.

[2] Notably, the Arbitrator then went on to state: "Any discipline administered by the Company for violation of its Substance Abuse Policy, or, for that matter, the Alfa Laval Drug and Alcohol Policy must comport with the just cause standard." ((Petition at Exh. 5, p. 18). Inexplicably, the Arbitrator does not reference the Plant Rules in this statement, despite describing in detail the applicable provisions of the Plant Rules on the prior page of the Award. (Petition at Exh. 5, p. 17-18). The Plant Rules are the very rules established and maintained by the Company as a direct result of the bargained-for Section 6(B) in the CBA, and specifically address the conduct at issue in the arbitration, prohibiting employees from "working while impaired by alcohol or drugs," and

In disregarding the management rights vested in the Company under the express terms of section 6(B), and imposing upon the Company additional burdens not founded in the CBA, the Arbitrator exceeded his authority and failed "to draw the essence of the award from the contractual agreement between the parties." *American La France v.*

---

prescribing the "immediate termination" of any employee committing such an offense. (Petition at Exh. 2, pp. 1-2). The Alfa Laval Drug and Alcohol Policy referenced by the Arbitrator does not even apply to the bargaining unit at the Company. The Niagara Blower Substance Abuse Policy, on the other hand, is consistent with the Plant Rules and clearly states, in a stand-alone paragraph, that "Niagara Blower will not tolerate employees who report for duty while impaired by use of alcoholic beverages or drugs," and further states that "[i]t is a condition of your continued employment with Niagara Blower that you comply with the Anti-Substance Abuse Policy."

*International Association of Machinests and Aerospace Workers Local Lodge 421*, 559 F. Supp. 21 (W.D. N.Y. 1983); (Petition at Exh. 1, p. 20-a) ("The arbitrator shall not have the right to add to, subtract from, modify or disregard any of the terms or provisions of this agreement."). As a result, his Award should be vacated to the extent that the Arbitrator modified the penalty imposed upon Mr. Beller by the Company or, in the alternative, vacated in its entirety.

**2. The Arbitrator Exceeded the Authority Granted to Him by the Terms of the Parties' Arbitral Submission.**

It is well-settled that an arbitrator's authority is also limited to that granted to him by the parties, and in particular, by the scope of the issue submitted. *187 Concourse Associates v. SEIU Local 32BJ*, 399 F.3d 524 (2nd Cir. 2004) ("[T]he arbitrator's authority was limited by both the CBA and the questions submitted by the parties for arbitration."); *Trade & Transport, Inc.*, 931 F.2d 191, 195 (2nd Cir. 1999) ("the submission by the parties determines the scope of the arbitrators' authority"); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) *cert. denied* 988 U.S. 944 (1988) ("[t]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission").

The limits placed upon an arbitrator by the questions submitted by the parties have been well-defined, under circumstances almost identical to those presented here, by the Second Circuit Court of Appeals decision in *187 Concourse Associates v. SEIU Local*

*32BJ*, 399 F.3d 524 (2nd Cir. 2004). *187 Concourse* involved the arbitration of a grievance protesting the termination of an employee following an outburst in which he became violent, cursed, and screamed at his supervisors. *Id.*, at 526. In that case, as in the instant matter, the parties asked the arbitrator to decide two questions: "Was the grievant discharged for just cause? If not, what shall the remedy be?" *Id*. The arbitrator determined that "[t]he behavior of the Grievant is incomprehensible in light of the facts as testified. It is completely unacceptable in the workplace and the Employer had no option but to terminate the Grievant." *Id*. Nevertheless, noting the grievant's prior good work record, the arbitrator reduced the termination to a disciplinary suspension upon final warning and six months' probation upon a stated belief that the grievant "should be given an opportunity to prove he can be a productive employee." *Id*.

On review, the Second Circuit vacated the arbitrator's award. Although it noted that "an arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached,'" the Court expressly found that, based on the terms of the parties' submission, the arbitrator had authority to address the issue of appropriate relief "only if he found no just cause" for the grievant's termination. *Id.*, at 527. And, although the union urged the Court to conclude that the arbitrator made no express finding as to just cause, the Court nevertheless found that the arbitrator exceeded his authority by addressing the appropriate relief. According to the Court:

> On this appeal the Union argues that the arbitrator did not make a finding of just cause when he stated that Concourse "had no option but to terminate" [the grievant]. According to the Union, by referring to [the grievant's] previously unblemished work record, the arbitrator applied an element of the just cause test and implicitly found no just cause for the termination. The Union asserts that this conclusion is buttressed by the very fact that the arbitrator reinstated [the grievant] to his job.
>
> We disagree. **Like the district court, we interpret the arbitrator's statement that [the employer] "had no option but to terminate" [the grievant] to be a finding of just cause for [the grievant's] discharge. Upon a finding of just cause, there was nothing further to be done. The arbitrator had no authority, under either the CBA or the submission, to fashion an alternative remedy**. By ordering [the grievant] reinstated, the arbitrator exceeded his authority.

Id. (emphasis added).

The issues raised in the instant matter are very similar to those addressed by the Second Circuit in *187 Concourse*. Here, as in *187 Concourse*, the parties stipulated the arbitral submission (i.e., "[w]as the discharge of [Mr. Beller] for proper cause? If not, what is the remedy?"). Here, as in *187 Concourse*, the Arbitrator effectively found the first issue in the Company's favor. Specifically, the Arbitrator found that: (1) the Company expressly categorized "working while impaired by alcohol or drugs" as an "intolerable violation" subject to "immediate termination;" (2) the Company established that Mr. Beller was aware of this prohibition and the consequences of a violation; and (3) Mr. Beller committed "misconduct" in violation of the Company's established work rules by reporting to work on March 6, 2015, "while he was impaired." (Petition at Exh. 5, pp. 17, 19, 21).

Having found that the Company "met its burden of proof of establishing misconduct in that Grievant reported to work on March 6, 2015, while he was impaired because of the ingestion of alcoholic beverages" (Petition at Exh. 5, p. 21), there was, in the words of the Second Circuit "nothing left to be done." *187 Concourse Associates,* 399 F.3d at 527. The Second Circuit's opinion in *187 Concourse* should control the result here; in short, after finding that Beller committed the alleged infraction, which was expressly classified by the Company in its Plant Rules as an "intolerable offense" subject to "immediate termination," the Arbitrator had neither the cause nor the authority to consider the issue of appropriate relief.

**3. The Arbitrator's Award Violates Explicit, Well-Defined, and Dominant Public Policy.**

Finally, the Arbitrator's Award violates explicit, well-defined, and dominant public policy by effectively prohibiting the Company from terminating an employee, including Mr. Beller, for working while impaired by alcohol or drugs "in the absence of evidence that [the employee's] behavior or work was, in fact, compromised." (Petition at Exh. 5, p. 21).

To determine whether an arbitral award violates public policy, courts are required to analyze: (1) whether a well-defined public policy exists by looking at statutes, regulations and case law; and, if so (2) whether the arbitral award clearly violates the well-established public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (U.S. 1987). As to the first element, courts in this Circuit have expressly noted that "there exists a public policy aimed at preventing employees from performing safety-sensitive jobs while under the influence of illegal drugs or alcohol." *Pepsi-Cola Albany Bottling Co. v. International Bhd. of Teamsters, Local 669*, 158 LRRM (BNA) 2522 (N.D.N.Y 1998). Indeed, as that court found:

> At this point in American history, few elements of public policy command the consensus that attaches to the policy **against the use of controlled substances by those whose work imperils others**. Judicial decisions, agency regulations, and legislative enactments combine to form a solid phalanx of positive law evidencing a well and defined and dominant public policy against the performance of safety-sensitive tasks while under the influence of drugs.

*Id*. (citing *Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841 (1st Cir. Mass. 1997)) (emphasis added).

The Arbitrator's Award unquestionably violates this explicit, well-defined and dominant public policy by effectively prohibiting the Company from terminating an employee, including Mr. Beller, for working while impaired by alcohol or drugs "in the absence of evidence that [the employee's] behavior or work was, in fact, compromised." (Petition at Exh. 5, p. 21). Mr. Beller's position as a Welder involves the performance of significant safety-sensitive tasks due not only to the nature of the work performed, but also to equipment used (including plasma torches and hydraulic presses) in close proximity to other employees. Indeed, most of the Company's hourly employees perform safety sensitive functions that carry with them the potential for severe consequences if not treated with the proper respect.

The Award, however, takes the position that the "potential for adverse consequences," without more, is not sufficient to justify the termination of an employee who reports to work to perform these safety sensitive functions while impaired. Specifically, the Award states: "In the absence of evidence that Grievant's behavior or work was, in fact, compromised, one is left with the potential for adverse consequences to have occurred. Under these circumstances, while Grievant's misconduct could be thought of as substantial to some extent, it cannot fairly be labeled as misconduct that requires his termination." (Petition at Exh. 5, p. 21). In other words, the potential for adverse consequences is not enough – some adverse consequence must actually have occurred.

The significant problem with this finding is obvious: the adverse consequences at issue are not limited to slurred speech, erratic behavior, or a spotty weld job. The potential adverse consequences are dire, if not fatal, in nature. In this respect, it is important to note that the Arbitrator agreed that the Company acted with "reasonable suspicion" when it subjected Mr. Beller to testing. (Petition at Exh. 5, p. 19). Furthermore, the severity of Beller's impairment is well-established in the record and accepted in the Award. Indeed, the Arbitrator fully credited the testimony of Dr. Costanza, the physician who interpreted Mr. Beller's blood alcohol test, who testified that Mr. Beller's BAC at the time he reported to work at 7:46 AM on March 6, 2015 (four hours before the breath test), likely was .09%. (Petition at Exh. 5, p. 20). This estimated level exceeded the *prima facie* standards utilized by the State of New York for driving while intoxicated (BAC of .08% or higher) and the level recognized by the state as *prima facie* evidence of impairment (BAC more than .07% up to .08%) (Petition at Exh. 3, p. 17), and the Arbitrator acknowledged that Mr. Beller's BAC was well above the threshold for proof of impairment while driving (BAC more than .05% up to .07%). (Petition at Exh. 5, p. 21). *See* N.Y. VAT. Law §§ 1192(2); 1195(2). As accepted by the Arbitrator, Dr. Costanza testified that Mr. Beller's BAC at the time he reported to work would have "adversely affected his judgment, coordination, depth perception, vision, concentration, his peripheral vision, and, in total, would have adversely affected his ability to function in the manufacturing environment." (Petition at Exh. 5, p. 20).

Whether or not adverse consequences actually resulted from Mr. Beller's impaired state, there is no doubt, based on the evidence presented and accepted by the Arbitrator, that Mr. Beller placed himself, and his co-workers, at risk on March 6, 2015. The Company cannot be required to withhold its most effective deterrent against the adverse consequences that could occur as a result of an employee working while impaired. The stakes involved are too high, not only for the employee committing the violation, but also for those with whom he works. The Company's Plant Rule served as a deterrent aimed at avoiding the very same harms addressed by public policy. The

Arbitrator's Award, however, which establishes precedent in future similar arbitrations involving the Parties, now allows an employee in the future to come to work impaired without fear of a termination being upheld unless the impairment actually results in an adverse consequence. The Award places employees of the Company, and the Company itself, at risk of serious harm. As a result, it violated the well-defined public policy aimed at preventing employees from performing safety-sensitive jobs while under the influence of illegal drugs or alcohol, and should be vacated to the extent that the Arbitrator modified the penalty imposed upon Mr. Beller by the Company or, in the alternative, vacated in its entirety.

## CONCLUSION & RELIEF REQUESTED

Based on the foregoing, Petitioner respectfully requests that this Court vacate the Arbitrator's Award to the extent that the Arbitrator modified the penalty imposed upon Mr. Beller by the Company or, in the alternative, vacate it in its entirety, and uphold the Company's decision to terminate Beller's employment effective March 9, 2015.

Dated: March 31, 2016.

BOND, SCHOENECK & KING, PLLC

By: /s/ James J. Rooney

James J. Rooney
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York 14202-2107
Tel: (716) 416-7048
Fax: (716) 416-7348
Email: jrooney@bsk.com

*Attorneys for Petitioner Niagara Blower Company*

TO: Joseph E. Giroux, Jr.
Creighton Johnsen & Giroux
295 Main Street
560 Ellicott Square Building
Buffalo, NY 14203
Tel: 716-854-0007
Email: jgiroux@cpjglaborlaw.com

*Attorneys for Respondent*